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Pretrial Hypnosis and Its Effect on Witness Competency in Criminal Trials: *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981)

Mark A. Christensen

University of Nebraska College of Law, mchristensen@clinewilliams.com

Note

Pretrial Hypnosis and its Effect on Witness Competency in Criminal Trials

State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981).

I. INTRODUCTION

The question of whether to admit the testimony of witnesses hypnotized prior to trial[1] in subsequent criminal proceedings has been the source of much controversy in recent years.[2] In recognition of the apparent ability of witnesses to "remember" more while under hypnosis, the 1970's brought a vast increase in the use of hypnosis in criminal investigations.[3] Due to this increase, courts have been forced to evaluate the effect of the hypnosis when those witnesses are subsequently called to testify at trial. Decisions on the admissibility of such testimony have ranged from complete admissibility,[4] to limited admissibility,[5] to complete exclusion.[6] Although the admissibility of hypnotically refreshed testimony is not

1. Only one known American case had allowed hypnotism in court. In that case the defendant was hypnotized out of the presence of the jury and questioned by the prosecuting attorney. As a result, the charge against the defendant was reduced from murder to manslaughter. State v. Nebb, No. 39,540 (Ohio C.P., Franklin Co., May 28, 1962). For a complete discussion of this case, see Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1, 4 (1964).
2. *See infra* notes 4-6.
3. *See* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Reiser, *Hypnosis as a Tool in Criminal Investigation*, POLICE CHIEF 36 (Nov. 1976); Worthington, *The Use in Court of Hypnotically Enhanced Testimony*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 402, 403 (1979) (reporting that in 1975 the Los Angeles Police Department implemented a program responsible for training nearly 300 people, primarily police officers, in the use of hypnosis).
4. *See, e.g.*, United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Clark v. State, 379 So. 2d 312 (Fla. Dist. Ct. App. 1979); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 395 N.C. 96, 244 S.E.2d 414 (1978); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

a new question,[7] the courts of many states are only now being faced with the issue[8] and others have yet to address it.

The Nebraska Supreme Court dealt with the admissibility of hypnotically influenced testimony in *State v. Palmer*, [9] which was handed down in December, 1981. In *Palmer*, the appellant argued that the pretrial hypnosis of certain prosecutorial witnesses rendered their testimony unreliable and therefore it should have been suppressed.[10] The court consulted several recent decisions from other jurisdictions on the admissibility of hypnotically influenced testimony and decided that those cases which held such testimony inadmissible presented the best rule. Thus the court held that until it is generally accepted by experts that hypnosis can accurately improve memory, a witness who has been questioned under hypnosis prior to trial, may not testify in a subsequent criminal pro-

5. *See* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982).
6. *See, e.g.*, State v. LaMountain, 128 Ariz. 547, 611 P.2d 551 (1980); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982); Strong v. State, — Ind. —, 435 N.E.2d 969 (1982); Collins v. State, 62 Md. App. 186, 447 A.2d 1272 (1982); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981); State v. Mack, 292 N.W.2d 764 (Minn. 1980); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).
7. The first American case to consider the admissibility of testimony by a previously hypnotized witness was State v. Exum, 138 N.C. 599, 50 S.E. 283 (1905). In that case, the court viewed evidence of hypnosis as affecting the credibility of the witness and ruled that inquiry as to whether the witness had been hypnotized was permissible on cross-examination.
8. Many of the recent decisions on the admissibility of hypnotically influenced testimony are cases of first impression. *See, e.g.*, Strong v. State, — Ind. —, 435 N.E.2d 969 (1982); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).
9. 210 Neb. 206, 313 N.W.2d 648 (1981). While this Note was in the advanced stages of publication, the Nebraska Supreme Court decided State v. Patterson, 213 Neb. 686, — N.W.2d — (1983), and State v. Levering, 213 Neb. 715, — N.W.2d — (1983). These cases modify the position taken in State v. Palmer, 210 Neb. 206, 313 N.W. 2d 648 (1981), regarding the extent of witness incompetency. In *Patterson* and *Levering*, the court essentially adopted the position of limited competency suggested in this Note. However, the court based this modification on similar changes in other states and failed to take advantage of the opportunity to ground its hypnosis analysis in the Nebraska Rules of Evidence which would have been the sound (and seemingly required) approach. *See infra* note 125. Notwithstanding these decisions, it is the aim of this Note to provide a helpful analysis for other jurisdictions and legal scholars who have yet to resolve questions concerning the admissibility of hypnotically influenced testimony.
10. *Id.* at 212, 313 N.W.2d at 652. The appellant also challenged the legality of his warrantless arrest in Texas. The court, noting that the legality of an arrest is governed by the law where the arrest takes place, found that a valid warrantless arrest had been made under the law of Texas. *Id.* The arrest issue will not be discussed in this Note.

ceeding regarding those matters covered in the hypnotic session.[11] The case was then remanded to the district court.[12]

Although the holding of *Palmer* appears to provide a clear rule, it does leave several questions unanswered as is indicated by the fact that the case is again pending before the court on appeal.[13] The reasoning of the court in reaching its decision is also somewhat lacking. The purpose of this Note is to analyze and evaluate *State v. Palmer*[14] in light of the decisions of other jurisdictions dealing with the admissibility of hypnotically influenced testimony as well as the current scientific and legal literature on this issue. First, the existing case law on hypnosis and hypnotically influenced testimony will be examined. Second, the *Palmer* decision itself will be compared and analyzed. Finally, modifications and clarifications of the position taken in *Palmer*, and other recent decisions in accord with *Palmer*, will be suggested.

II. THE CASE LAW

The art, or science, of hypnosis began centuries ago[15] and has long been shrouded with an aura of mystery and evil. The American legal system has traditionally viewed hypnotism with a large degree of skepticism.[16] The first American case to consider hypnosis was the 1897 case of *People v. Ebanks*.[17] In *Ebanks*, when confronted with a witness who proposed to testify to what the defendant had told him while under hypnosis, the court simply stated that "the law of the United States does not recognize hypnotism"[18] and refused to admit the testimony.[19] *State v. Exum*[20] is

11. State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981).
12. A motion for rehearing by the State was overruled February 17, 1982. The mandate remanding the case to the District Court of Hall County was issued February 18, 1982.
13. On remand, the district court allowed the witness to testify to those events recalled prior to hypnosis and to identify the appellant and his wife, reasoning that the Supreme Court had not meant to preclude that limited amount of testimony. Palmer has appealed this decision and the case is now pending before the Supreme Court. The court heard oral arguments on May 2, 1983.
14. 210 Neb. 206, 313 N.W.2d 648 (1981).
15. Modern hypnotism originated in the 18th century with the work of Dr. Franz Anton Mesmer, a Viennese physician. Mesmer believed a type of animal magnetism emanated from his hands and produced hypnotic effects. Controversy has surrounded hypnotism ever since the days of Mesmer. E. HILGARD, EXPERIENCE OF HYPNOSIS 3-5 (1968); Diamond, *supra* note 3, at 318; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567 (1977).
16. *See generally* Note, *Hypotism, Suggestibility and the Law*, 31 NEB. L. REV. 575 (1952) (demonstrating the early views of hypnosis in the law).
17. 117 Cal. 652, 49 P. 1049 (1897).
18. *Id.* at 665, 49 P. at 1053.
19. Even today courts uniformly exclude statements made while under hypnosis.

the earliest known case to actually consider the effect of pretrial hypnosis on witness testimony and in *Exum*, the repressive view reflected in *Ebanks* was relaxed somewhat. Although the *Exum* court recognized that the source of the power of hypnosis and the extent of its influence were, for the most part, unknown, it viewed the evidence of hypnosis as only affecting the credibility of the witness and allowed her to testify.[21]

These early cases were followed by a long period with very little case law on hypnosis reported.[22] This period of inactivity finally drew to a close in the 1950's when decisions on hypnosis began to occur with greater frequency.[23] However, it was not until 1968 that a reported case again dealt with the effect of pretrial hypnosis on witness competency. In 1968, *Harding v. State*,[24] the watershed case on the admissibility of hypnotically influenced testimony, specifically addressed the issue.

In *Harding*, a young women was shot, and later, raped. Unable to recall anything after the shooting, the victim was hypnotized to enhance her recollection of the events following the shooting. While under hypnosis, she gave a detailed account of those events and named the defendant Harding as her assailant. She repeated this account in court from her hypnotically refreshed memory. The court held that this testimony was admissible since the victim had testified from her own recollection. The fact that her recollection had been achieved in part by hypnosis was viewed as only affecting the weight given to her testimony by the trier of fact.[25]

The sufficiency of the victim's testimony to support a guilty verdict was viewed as a separate inquiry in *Harding*. The testimony of the hypnotist regarding the procedure of hypnosis and its effect

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See, e.g., Shockey v. State, 333 So. 2d 33 (Fla. Dist. Ct. App.), *cert. denied* 345 So. 2d 247 (Fla. 1976); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (1974); People v. Hangsleben, 86 Mich. App. 718, 273 N.W.2d 539 (1978); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1951); State v. Harris, 241 Or. 224, 405 P.2d 492 (1965); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974). These decisions rest in part on the hearsay nature of such testimony, but also reflect the mistrust of any hypnotic evidence.

20. 138 N.C. 476, 50 S.E. 283 (1905).

21. *Id.* at 484, 50 S.E. at 286. *But cf.* Austin v. Barker, 110 A.D. 510, 96 N.Y.S. 814 (1906) (finding that testimony of the previously hypnotized witness alone was insufficient to sustain a verdict for plaintiff).

22. Only one reported American case between 1915 and 1950 involved any aspect of hypnosis. Spector & Foster, *supra* note 15, at 579 n.67.

23. *See, e.g.*, Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959) (held defendant has a right to employ hypnotist in his defense); People v. Marsh, 170 Cal. App. 2d 284, 338 P.2d 495 (1959) (court refused defense request to have defendant testify under hypnosis).

24. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

25. *Id.* at 236, 246 A.2d at 306.

on the witness was carefully examined[26] in order to assess the reliability of the witness' testimony. The victim's account of the hypnotic session was also scrutinized. The court finally concluded that in light of the hypnotist's opinion that the victim's testimony was reliable and the fact that her testimony was corroborated on several points, the hypnotically refreshed testimony was sufficient to support a jury verdict of guilty.[27]

Harding was followed by numerous cases which adopted its position of complete admissibility.[28] In the federal courts, the admissibility of hypnotically influenced testimony became so well-established that it was no longer necessary to provide a foundation concerning the nature and effect of hypnosis.[29] Hypnosis was viewed as affecting only the credibility, not admissibility, of testimony. This further increased the use, and occasionally the abuse,[30] of hypnosis in criminal investigation. Eventually, however, the trend toward the acceptance of hypnosis in the criminal process began to change as a substantial controversy arose within the scientific community as to the reliability of hypnotically influenced testimony.[31] Cases began to go the other way on the issue and hold such testimony inadmissible.[32]

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26. The psychologist who had hypnotized the witness in *Harding* explained the process of hypnosis and the general procedures he had used in that particular case. In doing so he discounted the possibility of undue influence and stated that in this case he felt the information recovered by hypnosis was reliable. The court gave great weight to these reassurances in reaching its decision to admit the testimony. Harding v. State, 5 Md. App. 230, 247, 246 A.2d 302, 312 (1968), *cert. denied*, 395 U.S. 949 (1969).
27. *Id.* The court also noted that medical science had begun to recognize the value of hypnosis as a means to restore memory.
28. *See supra* note 4.
29. United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979) (holding that since hypnotically refreshed evidence is admissible, there was no need for the establishment of foundation regarding the nature and effects of hypnosis).
30. Police officers and other law enforcement personnel with little training in hypnosis, and with even less understanding of the effects of hypnosis on the human mind, have been hypnotizing witnesses themselves in the course of criminal investigations. Their lack of training and obvious bias has become a source of concern to professionals in the field of hypnosis. *See*, *Resolution by the International Society of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 453 (1979); *Resolution by the Society of Experimental Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 452 (1979).
31. *See* Diamond, *supra* note 3; Hilgard & Loftus, *Effective Interrogation of the Eyewitness*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 342 (1979); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979) (suggesting minimal safeguards if hypnotically enhanced recall is to be used in court); Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437 (1979).
32. *See supra* note 6.

The primary line of demarcation between those post-*Harding* cases which hold hypnotically influenced testimony admissible and those which hold it inadmissible is the *Frye* test.[33] The *Frye* test is basically a rule which requires that a scientific procedure or technique must have gained general acceptance in the particular field in which it belongs before testimony as to the results of that procedure is admissible in court.[34] Although this requirement of scientific acceptance originated in considering the admissibility of polygraph results, it has been applied to many other scientific tests and procedures.[35] Recently, a number of courts have applied the *Frye* test to hypnosis, reasoning that hypnosis is employed in much the same manner as the polygraph and therefore should be judged by the same standards.[36] For the most part, these courts have found that hypnosis fails to satisfy the requirements of *Frye* and therefore have refused to admit hypnotically influenced testimony.[37] In contrast, *Harding* and those cases adopting its approach generally do not even address the *Frye* test.[38]

The first major case to apply the *Frye* test of admissibility to hypnotically influenced testimony was *State v. Mack*.[39] The Minnesota court had previously utilized the *Frye* test in considering

33. The *Frye* test is a general test for the admissibility of scientific techniques which originated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *Frye* involved expert testimony based on the results of an early type of polygraph test.

34. *Frye* held that before a court can admit expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs. *Id.* at 1014.

35. *See, e.g.*, United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981) (photograph dating by mathematical and astronomical calculations); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (ion microprobic analysis of human hair); United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976) (spectrographic voice identification); Scales v. City Court, 122 Ariz. 231, 594 P.2d 97 (1979) (breathalyzer); People v. Jones, 110 Misc. 2d 118, 443 N.Y.S.2d 551 (Dutchess County Ct. 1981) (odontological identification of bite marks); State v. Washington, 52 Cal. 2d 636, 343 P.2d 343 P.2d 577 (1959) (truth serum); State *ex rel.* Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971) (spectrograph voice analysis); People v. Smith, 229 Kan. 47, 622 P.2d 986 (1981) (enzyme analysis of blood); State v. Clawson, 270 S.E.2d 659 (W.Va. 1980) (hair analysis).

36. *See supra* note 6. Actually there is a crucial distinction between hypnosis and polygraph tests which these courts have failed to note. *See infra* notes 110-11 and accompanying text.

37. *See supra* note 6.

38. *See supra* note 4.

39. 292 N.W.2d 764 (Minn. 1980). In applying the *Frye* rule the court noted that "[u]nder the *Frye* rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." *Id.* at 768.

the admissibility of polygraph results[40] and voiceprints[41] and believed that the test was equally applicable in the context of hypnotically refreshed testimony. Upon applying the *Frye* test to such testimony, the court concluded that hypnotic evidence failed to meet the standard of reliability required by *Frye*.[42]

In reaching its decision of inadmissibility, the *Mack* court considered the testimony of five experts on hypnosis and memory retrieval who had testified in an omnibus hearing in the court below.[43] The testimony of those experts dealt primarily with the content of memory revived by hypnosis and although they agreed that hypnosis can produce accurate recall, several factors that may reduce historical accuracy were also established. The court emphasized four such factors in its analysis. First, "a hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended."[44] Therefore, the subject's post-hypnosis memory might not be entirely his own recall.[45] Second, expert testimony also indicated a tendency on the part of hypnotized subjects to fill any gaps in their memories with extraneous or fantasized material rather than admit they "don't know."[46] This process, called confabulation, further reduces the reliability of testimony from a hypnotically refreshed memory.[47] The third problem noted

40. State v. Wakefield, 263 N.W.2d 76 (Minn. 1978).
41. State *ex rel.* Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971).
42. State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).
43. Among the experts testifying in the *Mack* hearing was Martin T. Orne. Dr. Orne is a foremost clinical and research expert on hypnosis. He is a professor of psychiatry at the University of Pennsylvania, former editor-in-chief of the Journal of Clinical and Experimental Hypnosis and has authored many scientific publications on hypnosis (he is co-author of the article on hypnosis in 9 ENCYCLOPEDIA BRITANNICA MACROPAEDIA 113 (15th ed. 1979)).
44. State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). The suggestibility aspect of hypnosis is a universally acknowledged phenomenon of hypnosis. *See, e.g.*, H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATIONS 14-15 (1967); E. HILGARD, *supra* note 15, at 9-10; Diamond, *supra* note 3, at 333; Spector & Foster, *supra* note 15, at 570. In fact, some writers view hypnosis as being virtually synonymous with suggestibility. E. HILGARD, *supra* note 15, at 9-10. It is this high degree of suggestibility which poses the most significant danger of abuse in the use of hypnosis in criminal investigations. A hypnotist can easily supply details and identities to a prospective witness and may even suggest responses by the tone of voice used or the manner in which a question is phrased. Diamond, *supra* note 3, at 333; Comment, *The Probative Value of Testimony From the Hypnotically Refreshed Recollection*, 14 AKRON L. REV. 609, 624-25 (1981). *See also* Hilgard & Loftus, *supra* note 31 (stressing that the precise wording of questions has a great impact on the answer of any witness and noting that hypnotized subjects are particularly susceptible to leading questions).
45. *See supra* note 44.
46. State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). *See supra* note 44.
47. Confabulation is another generally recognized aspect of hypnosis. *See, e.g.*, Diamond, *supra* note 3, at 335; Dilloff, *The Admissibility of Hypnotically Influ-*

was the inability to determine which parts of the hypnotically refreshed memory are accurate and which parts are the product of suggestion, confabulation, or outright lies.[48] Finally, "a memory produced under hypnosis becomes hardened in the subject's mind"[49] to such an extent that cross-examination is no longer an adequate means of testing reliability.[50] The agreement of the experts on the combination of these factors convinced the *Mack* court that hypnotically influenced memories were not scientifically reliable as accurate and thus failed the *Frye* test.

The final holding of *Mack* is that "a witness whose memory has been revived under hypnosis ordinarily must not be permitted to testify to matters which he or she remembered under hypnosis."[51] The court, however, made it clear that its decision was not meant to foreclose the use of hypnosis as an investigative tool, noting that facts obtained from a witness through hypnosis may provide valuable leads to the solution of a crime.[52]

Several courts have recently adopted the reasoning of *Mack* and reached substantially similar holdings.[53] Indeed, the rule of *Mack* appears to be the current trend. The most significant of these recent decisions is *Collins v. State*.[54] *Collins*, a decision reversing the position the same court had taken in *Harding*, adopted the *Frye* test and held hypnotically influenced testimony inadmissible. *Collins* thus destroys the very foundation of those cases that

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enced Testimony, 4 OHIO N.U.L. REV. 1, 5 (1977); Orne, *supra* note 31, at 317-18; Comment, *supra* note 44, at 619. Through this process the hypnotized subject fills in the gaps in his memory with predominantly fantasized material. *See infra* text accompanying note 89. Motivation to confabulate is attributable in part to a desire to please the hypnotist and in part in response to the suggestion that the subject remember the event completely.

48. Most authorities agree that "there is no way, however, by which anyone—even a psychologist or psychiatrist with extensive training in the field of hypnosis—can for any particular piece of information determine whether it is a product of actual memory versus confabulation *unless* there is independent verification." Orne, *supra* note 31, at 318. The same is true of those memories that are the product of suggestion. Diamond, *supra* note 3, at 334. Not even the subject can determine which is which. This makes an assessment of the accuracy of hypnotically refreshed testimony virtually impossible.
49. State v. Mack, 292 N.W.2d 764 (Minn. 1980).
50. The process of hypnosis resolves doubts and uncertainties in the mind of the subject and adds significantly to his confidence in his recall. Diamond, *supra* note 3, at 339. A person who was once unsure as to what he actually observed may become quite confident of post-hypnotic memories. This phenomenon hinders the effective cross-examination of the witness considerably and has been the basis of constitutional arguments against the use of hypnotically refreshed testimony. *See infra* notes 94-98 and accompanying text.
51. State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980).
52. *Id.*
53. *See supra* note 6.
54. 52 Md. App. 186, 447 A.2d 1272 (1982).

have viewed hypnosis as only affecting the credibility of witnesses.[55] The overruling of *Harding* may trigger further reversals in those jurisdictions which have previously adhered to the *Harding* approach and will undoubtedly have a substantial impact on those courts considering the admissibility question for the first time.[56]

There is a middle ground between the *Mack* rule of strict inadmissibility and the *Harding* approach. This middle ground is exemplified by the position adopted in *State v. Hurd*[57] which neither requires that hypnosis be generally accepted as a means of producing historically accurate recall,[58] nor allows automatic admissibility. Instead, the *Hurd* court held that "hypnotically-induced testimony may be admissible if the proponent can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy."[59] The court recognized the generally accepted fac-

55. *See supra* note 4, for those cases following the *Harding* approach. The most recent is Chapman v. State, 638 P.2d 1280 (Wyo. 1982). In *Chapman*, decided just a year ago, the majority completely ignored the *Frye* test and resolutely followed the *Harding* line of cases, holding that evidence of hypnosis did not affect the competency of the witness, only her credibility. The Wyoming court's holding is particularly surprising in light of the change in attitudes toward the use of hypnosis since the *Harding* decision.

56. Actually the demise of *Harding* was foreshadowed by Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981), in which the Maryland Court of Appeals decided that the *Frye* test was applicable to hypnotically influenced testimony but remanded the case to determine whether such testimony passed that test.

57. 86 N.J. 525, 432 A.2d 86 (1981).

58. The *Hurd* court agreed that hypnotically refreshed testimony must meet the standard of acceptability for scientific evidence to be admissible in a criminal trial, but formulated that standard as requiring that the scientific test have "sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth." *Id.* at 536, 432 A.2d at 91 (quoting State v. Cary, 49 N.J. 343, 352, 230 A.2d 384 (1967)). The court then found that if conducted properly and used only in appropriate circumstances, hypnosis met that standard. *Id.* at 538, 432 A.2d at 92.

The most important distinction between the test applied in *Hurd* and the test applied State v. Mack, 292 N.W.2d 764 (Minn. 1980), is that under the *Hurd* version of the *Frye* test, scientific reliability as an indicator of truth was not required of hypnosis. The court recognized that, unlike the polygraph or truth serum, the purpose of hypnosis is not to obtain truth, but rather to restore memory. In light of this distinction the court reasoned that hypnosis is sufficiently reliable if it is shown to yield recollections as accurate as those of an ordinary witness. *See infra* note 61 and accompanying text. *See also* Spector & Foster, *supra* note 15, at 584 (making the same distinction between truth indicators and hypnosis and noting that even ordinary eyewitness testimony is often factually inaccurate and unreliable).

59. State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 92 (1981).

tors that contribute to the unreliability of hypnotic recall,[60] but reasoned that exclusion of hypnotically induced testimony as a matter of law was unnecessarily broad. Further, the court believed that such a holding would result in the exclusion of evidence just as trustworthy as other eyewitness testimony commonly admitted since even ordinary eyewitness accounts are not completely accurate.[61] To aid in determining whether hypnotically refreshed testimony met this standard in a particular case,[62] and to ensure a minimum level of reliability, the court adopted a set of procedural requirements[63] that must be complied with prior to the introduction of hypnotically refreshed testimony. Compliance with these

60. The problems noted by the court were: (1) extreme vulnerability to suggestion; (2) loss of critical judgment and a corresponding increase in confidence; and (3) the tendency to mix memories evoked under hypnosis with prior recall and the inability to tell which is which. State v. Hurd, 86 N.J. 525, 539-40, 432 A.2d 86, 93 (1981).

61. Psychological research does reveal many of the same shortcomings in ordinary eyewitness testimony, as found in hypnotically refreshed testimony. *See generally* Hilgard & Loftus, *supra* note 31; Levine & Tapp, *The Psychology of Criminal Investigation*, 121 U. PA. L. REV. 1079 (1973); Loftus & Loftus, *On the Permanence of Stored Information in the Human Brain*, 35 AM. PSYCHOLOGIST 409 (1980); Putnam, *supra* note 31.

62. The *Hurd* court envisioned a case-by-case determination of the reliability of hypnotically refreshed testimony rather than deciding the matter only once as was done in State v. Mack, 292 N.W.2d 764 (Minn. 1980), and the cases which follow its approach. *See supra* note 6 for those cases following *Mack*. This case-by-case analysis has been criticized by some courts as being a waste of judicial resources while still failing to remove the dangers of hypnotically refreshed testimony. *See* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 208, 644 P.2d 1266, 1294 (1982); People v. Shirley, 31 Cal. 3d 18, 39-40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255 (1982); People v. Gonzales, 108 Mich. App. 145, 159, 310 N.W.2d 306, 313-14 (1981). *See also* State v. Palmer, 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981).

63. The procedural safeguards adopted in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), are based on those suggested by Martin T. Orne. *See supra* note 43 for Dr. Orne's qualifications. The requirements are:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session . . . .
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> Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.
>
> Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or in other suitable form . . . .
>
> Fourth, *before* inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them . . . .
>
> Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the preinduction interview, the hypnotic session, and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have received . . . .
>
> Sixth, only the hypnotist and the subject should be present dur-

safeguards is intended to minimize the major factors that render hypnotically influenced testimony unreliable and assist the trial court in its determination of the reliability, and therefore the admissibility, of the testimony.[64]

Several commentators[65] and courts[66] have endorsed the safeguards set forth in *Hurd* and agree that hypnotically influenced testimony should be admitted if compliance with such safeguards is shown. Others argue that such an approach is impractical and inadequate.[67] Some courts have adopted even more extensive safeguards in an effort to ensure reliability.[68] The current trend, however, remains one of per se inadmissibility with at least five jurisdictions in 1982 alone speaking out strongly against the admissibility of hypnotically influenced testimony.[69] *State v. Palmer*[70] is in accord with this trend.

III. ANALYSIS OF *STATE v. PALMER*

The hypnotic sessions conducted in the *Palmer* investigation were performed in such a manner that few jurisdictions would

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ing any phase of the hypnotic session, including the prehypnotic testing and the post hypnotic interview . . . .

Id. at 544-46, 432 A.2d at 96-97.

64. Compliance with the six procedural requirements, *supra* note 63, does not ensure admissibility. The party seeking to introduce hypnotically refreshed testimony must still demonstrate by clear and convincing evidence that the testimony is reasonably likely to be accurate evidence. State v. Hurd, 86 N.J. 525, 546, 432 A.2d 86, 97 (1981). *See supra* note 58 for the standard of reliability. In addition, even after it is shown that the testimony is admissible, the opponent may still challenge the particular procedures followed in that case, although he may not attempt to prove the general unreliability of hypnosis. State v. Hurd, 86 N.J. 525, 543, 432 A.2d 86, 95 (1981).

65. *See* Comment, *supra* note 44, at 628-29; Note, *Safeguards Against Suggestiveness: A Means for Admissibility of Hypno-Induced Testimony*, 38 WASH. & LEE L. REV. 197, 211 (1981).

66. *See* State *el rel.* Collins v. Superior Court, 132 Ariz. 180, 210, 644 P.2d 1266, 1296 (1982) (suggesting that the Orne standards adopted in *Hurd* be followed when using hypnosis in criminal investigations); State v. Beachum, 97 N.M. 682, 689, 643 P.2d 246, 253 (1981); State v. Long, 32 Wash. App. 732, —, 649 P.2d 845, 847 (1982).

67. *See supra* note 62.

68. *See* People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (N.Y. Trial Term 1980); People v. McDowell, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (Sup. Ct. 1980).

69. The five jurisdictions that have recently decided that hypnotically influenced testimony should be inadmissible are: Arizona (State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982)); California (People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982)); Indiana (Strong v. State, — Ind. —, 935 N.E.2d 969 (1982)); Maryland (Collins v. State, 56 Md. App. 186, 447 A.2d 1272 (1982)); and New York (People v. Hughes, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982)).

70. 210 Neb. 206, 313 N.W.2d 648 (1981).

have admitted the subsequent testimony of the witnesses involved. The hypnotists were rank amateurs[71] and there is some evidence of improper suggestion.[72] The testimony would have been inadmissible even under the *Hurd* standards.[73] The Nebraska Supreme Court, however, rejected the *Hurd* approach, finding that deciding on a case-by-case basis whether hypnotically refreshed memory was as accurate as normal recall would be virtually impossible.[74] The court reasoned that the better rule was that set forth in *Mack*.[75]

In discussing the *Mack* holding, the *Palmer* court noted that *Mack* had applied to hypnosis the same test that the results of mechanical and scientific testing are subject to: general acceptance by experts in the field that the results are scientifically reliable as accurate.[76] The court then went on to apply its own version of the same test, holding as follows:

> [U]ntil hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview.[77]

This is quite clearly an application of the *Frye* test, but the court did not refer to *Frye* at any point in the decision or even cite previous Nebraska decisions where a similar test was used.[78] More significantly, in applying a test of admissibility based upon scientific

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71. The hypnotic sessions in *Palmer* were conducted by law enforcement personnel. Neither of the hypnotists had any professional medical, psychiatric, or psychological training. Their training in hypnosis consisted of a four-day course taken just three months before the investigation began. *Id.* at 213-14, 313 N.W.2d at 653.
72. No statement was obtained from the subjects prior to hypnosis, but the sessions were recorded. The expert for the defense, a psychiatrist who had specialized in hypnosis for 20 years, testified that portions of the interviews were improperly suggestive. *Id. See also* Appellant's Brief at 27-28, State v. Palmer, No. 82-548 (Neb. Oct. 22, 1982) (quoting unduly suggestive portions of the hypnotic session). *See supra* notes 12-13.
73. *See supra* note 63.
74. 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981). On the facts of *Palmer* the decision as to whether to admit the hypnotically refreshed testimony would have been very simple under the *Hurd* analysis. The procedural requirements adopted in *Hurd*, *supra* note 63, were not complied with and therefore the testimony would have been automatically inadmissible.
75. 210 Neb. 206, 217, 313 N.W.2d 648,654 (1981).
76. 210 Neb. 206, 215, 313 N.W.2d 648, 653-54 (1981).
77. 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981).
78. Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (citing *Frye* and finding that the polygraph had not yet received general scientific acceptance and therefore was inadmissible). *See* State v. Steinmark, 195 Neb. 545, 239 N.W.2d 495 (1976); Parker v. State, 164 Neb. 614, 83 N.W.2d 347 (1957).

acceptance in the relevant field, the court failed to cite even one scientific commentary on the reliability of hypnosis.[79] The court merely noted that the expert who had testified in *Mack* had found hypnosis unreliable as an "indicator of truth"[80] and adopted the same rule the *Mack* court had adopted upon hearing him testify—per se inadmissibility. This shows a rather surprising lack of critical analysis considering the controversial nature of this issue.

The court cited *Harding* in passing merely to demonstrate what it viewed as an illogical distinction between two lines of cases, one of which admits the hypnotically induced testimony of prosecutorial witnesses and another which excludes exculpatory hypnotically induced testimony of criminal defendants.[81] *Greenfield v. Commonwealth*[82] was cited as an example of those cases holding exculpatory hypnotically influenced testimony inadmissible. An examination of the facts of *Greenfield* reveals that the supposedly illogical distinction based upon the exculpatory or inculpatory nature of the testimony does not exist. *Greenfield* involved an attempt by the defense to introduce the testimony of the hypnotist concerning the contents of what the defendant had said while under hypnosis.[83] This type of hearsay hypnotic testimony has been uniformly excluded for decades.[84] That is not to say that criminal defendants or defense witnesses who testify from hypnotically refreshed memories are treated any differently than prosecutorial witnesses hypnotized prior to trial.[85] The relevant distinction is the hearsay or nonhearsay nature of the testimony,

79. The closest the court came to examining expert opinion on hypnotically influenced testimony was to note that "the authorities agree that the problem is that hypnosis can create a memory of perceptions which did not previously exist and therefore bring forth a 'memory' of events which were nonexistent" before hypnosis. State v. Palmer, 210 Neb. 206, 214, 313 N.W.2d 648, 653 (1981). The court went on to point out some additional problems with hypnotically refreshed testimony but never did explain who "the authorities" were.

80. 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981).

81. This distinction, characterized as one "between hypnotically-induced testimony offered by the defendant to exculpate and that offered by the prosecution to make its case" was first perceived in State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980). The Nebraska court simply adopted the *Mack* view, using almost the same language to describe the distinction. Careful analysis by the court would have revealed that in fact there is no inconsistency between the cases cited. *See infra* text accompanying notes 82-85.

82. 214 Va. 710, 204 S.E.2d 414 (1974).

83. *Id.* at 715, 204 S.E.2d at 418.

84. *See supra* note 19.

85. A criminal defendant may even have a right to employ a hypnotist to help him recall crucial events in his defense. In Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959), it was held to be an abuse of discretion to refuse to permit a defendant to employ a hypnotist in this manner. *Contra*, State *ex rel.* Sheppard v. Kohlentz, 174 Ohio St. 120, 187 N.E.2d 40 (1962).

rather than whether the testimony is offered by the prosecution or defense. The court's attempt to imply otherwise demonstrates yet another flaw in the reasoning of the *Palmer* opinion.

Despite the analytical weaknesses of the decision, *Palmer* does reach the correct conclusion as to the general reliability of hypnosis. If expert opinion had been examined, the court would have found that most authorities do agree that memories retrieved by hypnosis are often inaccurate and may be the product of suggestion or confabulation.[86] The mind is not a videotape recorder that can play back past events in precise detail.[87] Instead, memory retrieval is a process of reconstruction and may be productive as well as reproductive.[88] The hypnotically refreshed memory may be a mosaic of "(1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole."[89] Details suggested by the hypnotist, either knowingly or unknowingly, are also integrated into the "memory."[90] It is also generally accepted that a person can willfully lie under hypnosis.[91] These factors and the inability to distinguish between accurate memories and those which are the product of suggestion, confabulation, or fabrication,[92] make hypnotically influenced testimony inherently unreliable and present substantial dangers[93] in its use as evidence in criminal prosecutions.

In addition to the unreliability of memories refreshed by hypnosis, considerations invoked by the criminal process itself also weigh against admitting hypnotically influenced testimony in crim-

86. *See supra* notes 44 & 47.

87. The "videotape recorder" or exact copy theory of memory is basically the belief that everything a person observes is recorded on his memory permanently. The key, under this theory, is just finding the mechanism to unlock those memories. Many individuals who encourage the use of hypnosis in criminal investigations support this theory. *See, e.g.*, H. ARONS, *supra* note 44, at 34-38; W. BRYAN, LEGAL ASPECTS OF HYPNOSIS 196-213 (1962); Reiser, *supra* note 3. However, recent research by experts in the field has led them to reject the "videotape recorder" theory. *See* Hilgard & Loftus, *supra* note 31. The current view is that memory retrieval is more a process of reconstructing past events and filling in any missing material. The resulting "memory," although often accurate, may at times bear little resemblance to the past experience. Loftus & Loftus, *supra* note 61, at 413. *See also* People v. Shirley, 31 Cal. 3d 18, 57-62, , 641 P.2d 775, 798-801, 181 Cal. Rptr. 243, 267-79 (1982).

88. *See supra* note 87.

89. Diamond, *supra* note 3, at 335.

90. *See supra* note 44.

91. Spector & Foster, *supra* note 15, at 594; Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 WILLAMETTE L.J. 665, 670-71 (1981); Comment, *supra* note 44, at 617.

92. *See supra* note 48.

93. *See infra* text accompanying notes 120-24.

inal proceedings. The sixth amendment[94] provides that the accused shall enjoy the right to confrontation, and vital to that right is the right of cross-examination.[95] Memories which have hardened under hypnosis[96] tend to frustrate the right of cross-examination. After the hypnotic session, defense counsel can no longer cross-examine the memory of the witness that existed prior to hypnosis and any uncertainty which may have been present cannot be demonstrated to the jury to discredit the witness. Thus the use of hypnosis has been analogized to the destruction of evidence by some commentators.[97] And although many cases fail to deal with the cross-examination aspect of the admissibility question, the Indiana Supreme Court has stated that the inability to effectively cross-examine alone is reason enough to exclude hypnotically influenced testimony.[98]

An additional constitutional problem arises when the pretrial hypnotic session results in a subsequent in-court or out-of-court identification of the defendant. The United States Supreme Court has stated that identifications may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate due process of law.[99] Therefore, it must be shown that identification testimony is reliable before it can be deemed admissible.[100] In assessing reliability, the suggestiveness of the identification procedure must be weighed against the factors set out in *Neil v. Biggers*[101] measuring the accuracy of identifications.[102] Due to the heightened suggestibility of hypnotized witnesses,[103] many identifications made after a hypnotic session will fail to meet this stan-

94. U.S. CONST. amend. VI.
95. Pointer v. Texas, 380 U.S. 400 (1965); Smith v. Illinois, 390 U.S. 129 (1968) (holding that the sixth amendment right of confrontation is applicable to the states under the fourteenth amendment).
96. *See supra* note 50.
97. *See* Worthington, *supra* note 3, at 414.
98. Strong v. State, — Ind. —, 435 N.E.2d 969, 970 (1982). *See also* State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1981) (holding that the barrier to cross-examination raised by hypnosis required an exception to its statutory rule of witness competency); Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981).
99. Stovall v. Denno, 388 U.S. 293, 302 (1967). *See* Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968).
100. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
101. 409 U.S. 188 (1972). The factors to be considered include:
> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200.
102. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
103. *See supra* note 44.

dard of reliability. At any rate, such identifications must be carefully scrutinized under the *Biggers* factors. Exclusion might not always be required but this is certainly an additional factor which must be considered in making the final decision as to the admissibility of hypnotically influenced testimony.[104]

All three of the factors discussed above, the inherent unreliability of hypnotically refreshed memory, the inability to effectively cross-examine the previously hypnotized witness, and the danger of unduly suggestive identifications, combine to make hypnotically influenced testimony unsuitable evidence for use in criminal trials and thus support the holding of *Palmer*. However, the evidentiary shortcomings of hypnotically influenced testimony were not the determinative factor in the *Palmer* decision. Instead, the court invoked its own version of the *Frye* test and held that hypnotically influenced testimony should be inadmissible because of the lack of general scientific acceptance of the reliability of hypnosis as an "indicator of truth."[105] Although the end result is the same under either approach, this application of a test of scientific acceptance, rather than examining the testimony under ordinary evidentiary standards, is the major defect in the reasoning of the *Palmer* decision, as well as other cases that apply the *Frye* test.

IV. SUGGESTED MODIFICATIONS AND CLARIFICATIONS

A. The Evidentiary Approach

The *Frye* test should not be applied to hypnotically influenced testimony. *Frye* was concerned with the admissibility of expert testimony deduced from the results of a scientific technique,[106] not the admissibility of eyewitness testimony.[107] The *Frye* test is clearly applicable in a situation where an expert is interpreting the results of a scientific technique, for in order to assess the credibility of his testimony, "the thing from which his deduction is made

104. Although most courts recognize the danger of improper suggestion in pretrial hypnosis, few have addressed the constitutional aspect of this problem. The issue was raised in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), but it was not a factor in the decision. The court did note, however, that in most cases identification testimony which meets the standard of admissibility set for all hypnotically refreshed testimony, *see supra* notes 57-64 and accompanying text, would not violate due process. *Id.* at 548, 432 A.2d at 98.

105. State v. Palmer, 210 Neb. 206, 217, 313 N.W.2d 648, 655 (1981).

106. *See supra* note 34.

107. A few commentators have recognized that the *Frye* test is not directly applicable to eyewitness testimony. *See* Comment, *supra* note 44, at 615; Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1217-18 (1981). This has also been judicially noticed. *See* People v. Hughes, 88 A.D.2d 17, 22-23, 452 N.Y.S.2d 929, 933 (1982) (Doerr, J., dissenting); State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 429 (1978).

must be sufficiently established to have gained general acceptance in the field in which it belongs."[108] The focus in such a situation is necessarily on the reliability of the underlying technique. In contrast, when considering the admissibility of eyewitness testimony, even though influenced by pretrial hypnosis, the relevant issue is the witness' knowledge of the events in question. The use of hypnosis does bear on the reliability of that knowledge but only affects the evidentiary value of the witness' testimony. Admissibility still must turn on the reliability of the testimony rather than the reliability of hypnosis.

In fact, the applicability of the *Frye* test to any aspect of hypnosis is questionable.[109] Hypnosis is conceptually different than other scientific techniques the *Frye* test has been applied to, such as the polygraph and voice-analysis.[110] Hypnosis is not meant to be an indicator of truth or a truth elicitor. Its purpose when used in criminal investigations is to enhance memory and aid recall. It is not expected to give infallible results[111] and should not be judged by a standard that demands such results. In criminal trials the finder of fact must remain the ultimate truth elicitor and the only question is whether hypnotically influenced testimony is evidence of sufficient competency to aid in that function.

Hypnotically influenced testimony should be treated just like any other eyewitness testimony. Rule 601[112] of the Nebraska Rules of Evidence provides that every person is competent to be a wit-

108. Frye v. United States, 293 F. 1013, 1014 (1923).

109. In MCCORMICK ON EVIDENCE § 203 (2d ed. 1972), it is argued that the *Frye* test should be discarded entirely. "General scientific acceptance is a proper condition for taking notice of scientific facts, but not a criterion for the admissibility of scientific evidence." *Id.* at 491. Scientific evidence should be received unless its admission creates evidentiary dangers such as undue prejudice, misleading the jury, or excessive consumption of time. This approach does have merit in that it would allow more flexibility in utilizing scientific advances and is more compatible with the statutory Rules of Evidence. *See infra* text accompanying notes 112-19.

110. There is a crucial distinction between the use of hypnosis as a means of enhancing the recollection of a witness and the use of the polygraph or narcoanalysis. The latter are generally used to demonstrate the subject is lying or to extract the truth. That has never been the goal of hypnosis. Its purpose is to revive the witness' memory or to sharpen recall. Therefore, testing the reliability of hypnosis as a means of finding the truth is inappropriate. Only a few courts have recognized this distinction. *See* State v. Hurd, 86 N.J. 525, 537, 432 A.2d 86, 92 (1981); State v. Beachum, 97 N.M. 682, 687-88, 643 P.2d 246, 251-52 (1981).

111. The primary use of hypnosis is as a therapeutic tool and for that purpose it need not produce historically accurate memory. Thus the accuracy of memories adduced under hypnosis is generally not a subject of concern among those who use it most. *See* State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).

112. NEB. REV. STAT. § 27-601 (1979); *See* FED. R. EVID. 601.

ness unless otherwise provided. Rule 602[113] limits this presumption of competency by requiring that the witness have personal knowledge of the subject,[114] but nowhere is hypnosis listed as a factor rendering a witness incompetent.[115] Furthermore, under rule 402[116] all relevant evidence is admissible. Therefore, if relevant, the hypnotically influenced testimony of any witness must at least initially be presumed to be admissible. However, rule 403[117] may lead to a different conclusion. Under rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[118] The key determination therefore is whether the probative value of hypnotically influenced testimony is substantially outweighed by the dangers of its use in court.[119]

The probative value of hypnotically influenced testimony is doubtful due to its questionable accuracy. The dangers of admitting such testimony at trial are numerous. A substantial danger of misleading the jury is present since the memory of the witness testifying might not be historically accurate.[120] It is also feared that juries may give excessive weight to hypnotically refreshed testimony as a result of misconceptions which exist as to the utility of hypnosis as a truth indicator.[121] The suggestibility aspect of hypnosis presents the danger that the hypnotically influenced testi-

113. NEB. REV. STAT. § 27-602 (1979); *See* FED. R. EVID. 602.

114. There may be some question as to the extent of the previously hypnotized witness' personal knowledge due to the danger of suggestion. *See supra* note 44.

115. It is possible to provide special rules of competency for hypnotized witnesses statutorily. Oregon has done just that. *See* OR. REV. STAT. § 136.675-.695 (1979) (The statute sets prerequisites to the use of testimony at trial and requires informed consent by those subjected to hypnosis. Evidence obtained in violation of the statute is inadmissible.).

116. NEB. REV. STAT. § 27-402 (1979); *See* FED. R. EVID. 402.

117. NEB. REV. STAT. § 27-403 (1979); *See* FED. R. EVID. 403.

118. *Id.*

119. A balancing test to determine the admissibility of hypnotically influenced testimony similar to rule 403 has been suggested by a few commentators in the past. *See* Comment, *supra* note 44, at 616; Note, *supra* note 107, at 1220. It is also the procedure which was utilized in State v. Beachum, 97 N.M. 682, 691, 643 P.2d 246, 255 (1981).

120. *See supra* notes 86-91 and accompanying text.

121. Laymen commonly associate great credibility with the technique of hypnosis. *See* Dilloff, *supra* note 47, at 9; Comment, *supra* note 91, at 673-75. This is in part due to the misconception that a hypnotized person "cannot tell a lie" and partly due to the convincing nature of testimony from a previously hypnotized witness. This phenomenon is common to results achieved through the aid of many scientific processes and has caused much concern in that it may interfere with the jury's ability to evaluate credibility. *See* Spector & Foster, *supra* note 15, at 595.

mony may be unfairly prejudiced.[122] Although additional rule 403 considerations might be listed, it is already clear that the dangers in admitting hypnotically influenced testimony substantially outweigh its minimal probative value. Even when safeguards which may reduce the danger of suggestions are implemented,[123] the probative value of the testimony remains slight due to the possibility of confabulation and fabrication. Thus, the balance must still be struck on the side of exclusion. This is particularly true when the constitutional problems previously discussed[124] are added to the equation.

Thus, the testimony of witnesses hypnotized prior to trial falls short of the standard of admissibility set forth in the Rules of Evidence. Although this conclusion yields the same result as that reached in applying the *Frye* test, the evidentiary approach is much more sound. Hypnotically induced testimony is still eyewitness testimony and it should be analyzed within the evidentiary framework designed to guide such an analysis rather than merely adopting another jurisdiction's rule of inadmissibility based on a test of questionable applicability.[125] The Rules of Evidence also allow more flexibility. It may be that in the future hypnotic techniques will advance to the point where memories refreshed by hypnosis will be substantially more reliable. The probative value of hypnotically refreshed testimony may no longer be outweighed by the dangers in admitting it. A trial court could then admit the testimony without waiting for a uniform consensus of scientific opinion. For the time being, however, it appears that courts may conclude as a matter of course that hypnotically influenced testimony is inadmissible due to rule 403 considerations.

B. The Extent of Witness Incompetency

A final criticism and suggested revision of the *Palmer* decision regards the extent of witness incompetency. The court held that a previously hypnotized witness "may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview."[126] But, as the concurrence pointed out, "the term subject matter is not defined."[127] The district court on remand and

122. *See supra* note 44.
123. The most commonly suggested safeguards are those adopted in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). *See supra* note 63.
124. *See supra* text accompanying notes 94-104.
125. Actually, it is not clear how the court can avoid using the evidentiary approach. NEB. REV. STAT. § 27-101 (1979) provides that the Rules of Evidence govern proceedings in all courts in the State of Nebraska.
126. State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981).
127. State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (Clinton, J., concurring).

the other courts which will attempt to interpret the *Palmer* decision are given little guidance as to the extent to which a previously hypnotized witness is to be restricted in testifying.[128]

Taken at face value, *Palmer* seems to hold that a witness who has been hypnotized prior to trial is precluded from testifying to any aspect of the subject matter covered in the pretrial hypnotic session.[129] If this is in fact the rule, Nebraska joins California[130] as one of the few jurisdictions to impose such a rule of complete incompetency and in doing so goes too far. To prohibit a previously hypnotized witness from testifying about any matter covered in the pretrial hypnotic interview places a high cost on the use of hypnosis and will inevitably put an end to its use in criminal investigations. Such a rule also excludes otherwise competent evidence.

In *People v. Shirley*,[131] the California Supreme Court also found that hypnosis failed the *Frye* test and held that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."[132] The court reasoned that hypnosis contaminated the witness' memory to such an extent that this rule of strict incompetency was absolutely required. However, questioning on topics wholly unrelated to those covered in the hypnotic interview is allowed.[133] Support for this position was found in the work of Dr. Bernard L. Diamond[134] who is the originator of the contamination theory. The court also cited cases from other jurisdictions which had imposed complete incompetency.[135] However, those

128. Justice Clinton, concurring, stated that in his view a witness should be allowed to testify to those things remembered prior to and independently of the hypnotic session if it could be reliably determined what that was. *Id.* That is also the rule the trial court adopted on remand.

129. The court does say that "testimony as to other subjects may or may not be admissible." State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981).

130. The California Supreme Court, in People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 242, (1982), held that a witness subjected to pretrial hypnosis is incompetent to testify to related matters from the time of hypnosis forward.

131. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, (1982).

132. *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273.

133. People v. Shirley, 31 Cal. 3d 18, 67, 641 P.2d 775, 805, 181 Cal. Rptr. 243, 273 (1982). The court also pointed out that it did not intend to foreclose the use of hypnosis for purely investigative purposes. Such a rule of witness incompetency, however, most assuredly does foreclose the use of hypnosis in criminal investigation.

134. *See* Diamond, *supra* note 3. Professor Diamond is a professor of law at the University of California, Berkeley, and a clinical professor of psychiatry at the University of California, San Francisco.

135. The California court cited State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981), and People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980), as cases holding

courts referred to in *Shirley* have now reversed their position on this issue[136] and they, along with the better-reasoned cases from other jurisdictions, now reject a rule of complete incompetency.

The better rule is that hypnosis does not render the witness incompetent to testify to those facts that the witness was able to recall and relate prior to hypnosis even if those facts were the subject of questioning in the hypnotic session. This is the position recently adopted by the Arizona Supreme Court in *State ex rel. Collins v. Superior Court*,[137] modifying the rule of total incompetency of its prior decision on hypnotically influenced testimony.[138] The *Collins* court did recognize that allowing witnesses to testify as to prehypnotic memories still presents certain problems,[139] but reasoned that the benefit of admitting such testimony, and thereby allowing the continued utilization of hypnosis as an investigatory tool, outweighed the dangers. However, the court did require that the party intending to offer the prehypnotic testimony must have recorded the witness' prehypnotic recall and have the recordation available at trial to assure that the testimony is limited to only those facts previously recorded.[140]

The *Collins* approach to the issue of incompetency is clearly superior to that of *Palmer* and *Shirley*. It is manifestly inconsistent for a court to encourage or comment on the merits of the use of hypnosis in criminal investigation and then adopt a rule of complete witness incompetency. Law enforcement authorities cannot justify jeopardizing an entire case by utilizing hypnosis, and thus rendering a key witness incompetent, on the chance that new leads might come from the session. The cost is too great even though the use of hypnosis is often successful in obtaining leads which aid in the solution of crimes.[141] A rule of total incompetency

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that pretrial hypnosis rendered a witness completely incompetent to testify to those matters covered in the hypnotic sessions. People v. Shirley, 31 Cal. 3d. at 45-50, 641 P.2d at 790-93, 181 Cal. Rptr. at 258-62. Both Arizona and Michigan have since abandoned this rule. *See infra* note 136.

136. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 405 (1981).

137. 132 Ariz. 180, 644 P.2d 1266 (1982).

138. State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981), was Arizona's leading case on hypnotically refreshed testimony until *Collins*.

139. The principal risk in allowing the witness to testify to those facts remembered before hypnosis recognized by the court is that the witness' heightened sense of confidence in his total recall after hypnosis will impair cross-examination. 132 Ariz. at 210, 644 P.2d at 1296.

140. The witness' knowledge prior to hypnosis can be recorded in written, tape recorded, or preferably, videotaped form. The court also suggested that some, if not all, of the Orne standards, *supra* note 63, be adopted by parties intending to use hypnosis for investigatory purposes. *Id.*

141. *See generally* E. BLOCK, HYPNOSIS: A NEW TOOL IN CRIME DETECTION (1976); Kroger & Douce, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLINICAL &

effectively ends the use of hypnosis in criminal investigations. That is a high cost for only a minimal amount of added protection since the risks of allowing a witness to testify only to prehypnotic recall are slight.

If a witness' testimony is strictly limited to prehypnotic recall, most of the dangers which render hypnotically affected testimony inadmissible are eliminated. The danger of improper suggestion and confabulation are removed since only those facts demonstrably recalled before hypnosis can be testified to. The Rules of Evidence would also now allow the admission of such testimony, since the rule 403[142] considerations have been reversed. The probative value of the testimony has increased and the dangers of misleading the jury and unfair prejudice have been reduced. The problem of ineffective cross-examination still exists to some degree, but it can be reduced by allowing the defendant to establish the possibility that the witness is now more certain of events only tentatively recalled before hypnosis. An indication of the certainty of the witness prior to hypnosis can be obtained by examining the required prehypnotic recording. Remaining objections can be alleviated by requiring that additional safeguards be complied with during any hypnotic session.[143]

V. ADDENDUM

The Nebraska Supreme Court has now resolved any uncertanty as to the extent of witness incompetency. In *State v. Patterson*,[144] decided after this Note was written, the court said:

> [A] Witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory stage of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.[145]

Thus the court has adopted the position suggested in this Note and taken by the district court on remand.[146] This approach has merit in that it protects the criminal process from truly unreliable evi-

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EXPERIMENTAL HYPNOSIS 358 (1979) (describing cases in which hypnosis has uncovered valuable leads).

142. NEB. REV. STAT. § 27-403 (1979); *see* FED. R. EVID. 403.

143. Compliance with the Orne safeguards, adopted in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), should be required when hypnosis is used for investigatory purposes. For a list of safeguards from Dr. Orne himself and the reasoning supporting them, *see supra* note 63.

144. 213 Neb. 686, — N.W.2d — (1983). *See also* State v. Levering, 213 Neb. 715, — N.W.2d — (1983) (following the rule set forth in *Patterson*). *See supra* note 9.

145. 213 Neb. at 692, — N.W.2d at —.

146. *See supra* note 13.

dence while preserving the opportunity to utilize hypnosis as an investigatory tool in criminal cases. However, the *Patterson* decision stops short of rectifying the analytical shortcomings of *Palmer*. The Nebraska Rules of Evidence are still not utilized in the analysis of witness incompetency and there is no indication of the means by which prehypnosis recall can be adequately shown.[147] Adoption of the *Hurd* safeguards,[148] requiring recordation of prehypnotic recall, and basing the competency determination on the applicable Nebraska statutes,[149] would have strengthened *Patterson* considerably. Hopefully, the court will incorporate these factors into its analysis of hypnotically influenced testimony at the earliest opportunity.

Mark A. Christensen '84

147. Instead of providing clear guidelines on how to demonstrate the existence of prehypnotic recall the court said: "How the court is to be satisfied must be determined on a case by case basis, and the authorities must therefore determine whether using hypnosis is worth the possible risk." 213 Neb. at 692, — N.W.2d at —. Such a statement only invites more complicated decisions in the future, when, by suggesting simple safeguards and procedures to be followed in the use of hypnosis, the court could have clarified matters for courts and investigators alike.

148. *See supra* note 63.

149. *See supra* notes 115-25 and accompanying text.